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No. 84-1168

In the Supreme Court of the United States

OCTOBER TERM, 1984

JEROME J. NASH

Appellant,

v.

CITY OF SANTA MONICA, et al.,

Appellees.

ON APPEAL FROM SUPREME COURT OF
THE STATE OF CALIFORNIA

MOTION TO DISMISS

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QUESTION PRESENTED

Whether the rational basis test should be abandoned and a new fundamental right created in land use cases involving demolition restrictions.

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No. 84-1168

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JEROME J. NASH,

Appellant,

v.

CITY OF SANTA MONICA, et al.,

Appellees.

MOTION TO DISMISS

Appellees City of Santa Monica and Santa Monica Rent Control Board move, pursuant to Supreme Court Rule 16, to dismiss the appeal filed herein by Appellant Jerome Nash ("Nash") for want of a substantial federal question.

STATEMENT OF THE CASE

This case involves a challenge to local government regulation of land use. Yet, in an abrupt departure from settled principles, appellant wholly avoids the issue of the regulation's economic impact. Despite Nash's contention, this case does not involve any fundamental "right to go out of business." Rather, the demolition restriction concerns only the existing use of land, which Nash seeks to change for increased profit. Thus, appellant not only rejects the most obvious and common manner of ceasing business—sale—he fails even to discuss its consequences. Instead,

appellant distorts the customary analytical framework for economic regulation cases and attempts to resurrect long-discarded theories of liberty interests in property. This would undo the controlling decision of *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978), and *Fresh Pond Shopping Center v. Callahan,* ____ U.S. ____, 104 S.Ct. 218 (1983), and threaten the cornerstone principles of *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926), and *Nebbia v. New York,* 291 U.S. 502, 531 (1934).

In the late 1970's the City of Santa Monica was confronted with a shortage of its traditionally scarce housing stock, aggravated by a "Demolition Derby" in which Santa Monica landlords razed over 1,300 rental units and converted hundreds of other apartments to condominiums, dislocating up to 5% of the City's population in a 15 month period. Housing units were demolished at 10 times the rate (relative to population) of neighboring Los Angeles.[1]

In response to the housing crisis, the citizens of Santa Monica by initiative added Article XVIII to the City Charter in 1979. This law provides for a rent control board ("the Board") with the authority to regulate rent increases and to control the removal of rental units from the housing market through demolition and conversion. The law also prohibits evictions except for specified cause.

The primary means of preserving scarce rental housing is Section 1803(t).[2] This section requires a landlord to obtain a "removal permit" prior to demolition. A permit

[1]The rental housing crisis has been noted and documented by Congress. *See* Condominium and Cooperative Conversion Protection and Abuse Relief Act, 15 U.S.C. § 3601 et seq., P.L. 96-399(94 Stat. 1672).

[2]Jurisdictional Statement ("J.S.") Appendix F, pp. 14-15. Section references are to the Santa Monica City Charter unless specified otherwise.

will be granted if either (1) the property is not habitable, (2) the landlord wishes to rebuild rental housing, or (3) the owner cannot make a reasonable return on investment.

A year before the Rent Control Law was enacted, Nash, a minor, purchased a 6 unit apartment building in Santa Monica. However, after the enactment of the law, Nash became dissatisfied:

> There is only one thing I want to do, and that is to evict the group of ingrates inhabiting my units, tear down the building, and hold on to the land until I can sell it at a price which will not mean a ruinous loss on my investment. J.S. A-4.

Although Nash began the process of obtaining a removal permit, he abandoned his application and filed a petition for writ of mandate in the Los Angeles Superior Court.[3] At trial, Nash admitted that the rentals provided a fair return on his investment in the property. He further conceded that demolition of the building would adversely affect the supply of housing in Santa Monica. J.S. A-5.

The trial court accepted Nash's argument that Section 1803(t) operated to deprive him of property without due process of law. It also declared, *sua sponte,* that Section 1803(t) resulted in a taking of his property without just compensation. It ordered that a writ of mandate issue commanding the City and the Board to grant Nash a removal permit for his property.

On appeal, Nash abandoned any claim based on a taking of his property. The Court of Appeal affirmed, finding a violation of the due process clause of Article I, Section 7(a) of the California Constitution (J.S. B-12).

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[3]Although Nash contends that the removal permit process is illusory (J.S. at 3), he made no showing other than the concession that he could not qualify for a permit. Further, Nash made no showing that the removal permit procedures are defective or inadequate.

The California Supreme Court reversed. It held that Section 1803(t), as applied to Nash, was constitutional. The majority found that the burden on Nash's asserted liberty interest by the demolition controls of Section 1803(t) was minimal and indirect and did not "warrant departure from the traditional tests used to determine the validity of economic regulation." J.S. A-8.

The court further held that the law did not impinge on any right to retain or sell property and was reasonably related to the legitimate goal of maintaining adequate rental housing. J.S. A-8. Chief Justice Bird, in a separate opinion, expressed the view that strict scrutiny was warranted but concluded that Section 1803(t) served a compelling governmental interest. J.S. A-18. Two justices dissented, primarily on grounds stated in the opinion of the Court of Appeal. J.S. A-20, 25. This appeal followed.

In June, 1984, after the cause was argued to the California Supreme Court, the electorate amended the City Charter by addition of Article XX, which permits conversion of apartments to condominiums, notwithstanding Section 1803(t), when the owner and two-thirds of the tenants agree. Section 1813, J.S. F-30. In November, 1984, the City Charter was further amended by the electorate to eliminate several requirements for a removal permit. See J.S. F-14[4] Neither of these amendments were before the lower courts, but they constitute the law currently applicable to appellant.

INTRODUCTION

The electorate of Santa Monica has determined, based on a finding of necessity, to preserve existing rental

[4]Prior to its amendment in November, 1984, Section 1803(t) required the Board to find, where removal was sought because of an inability to earn a fair return, that (1) the building was not occupied by persons of low or moderate income, (2) could not be afforded by persons of low or moderate income, and (3) removal would not adversely affect the housing supply. J.S. E-10-11.

properties from destruction without cause. Although Nash claims that the demolition law restricts his personal liberty interests, the California Supreme Court correctly observed that "the actual limitation upon those interests . . . is minimal and not significantly different from other constitutionally permissible limitations upon the use of private property." J.S. A-2.

The California Supreme Court found that the demolition law imposed no compulsory servitude sufficient to invoke the Thirteenth Amendment. J.S. A-6. It rejected the Court of Appeal's creation of a new fundamental right predicated on earlier California cases involving the right to pursue a livelihood. *Id.* The decision is manifestly correct. Demolition restrictions do not impair any fundamental rights, nor do they require departure from traditional due process analysis of economic regulation. *Cf. Nebbia v. New York*, 291 U.S. 502, 531 (1934).

Demolition restrictions have been uniformly analyzed as land use regulations and upheld as valid exercises of the police power. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). A non-discriminatory municipal land use regulation is valid unless it does not substantially advance legitimate state interests (*Nectow v. Cambridge*, 277 U.S. 183 (1928)), or denies a property owner economically viable use of his property without compensation. (*Agins v. City of Tiburon*, 447 U.S. 255 (1980)).

Appellant's characterization of this case as one involving personal liberties is nothing more than a subterfuge to avoid a "taking" analysis. He must do so because he offered no evidence that a taking occurred and conceded the taking issue. Nowhere does Nash claim that appellees interfere with the existing use of his property; rather, he complains of his inability to change that use. Accordingly, this case is controlled by *Fresh Pond Shopping Center v.*

Callahan. ____ U.S. ____, 104 S.Ct. 218 (1983), wherein this Court dismissed for want of a substantial federal question a challenge to demolition controls virtually identical to those at issue here.

The dissent below, upon which Nash relies, framed the "fundamental interest" involved as the right to go out of business while simultaneously keeping the land for future development or use. J.S. A-29. As thus framed, this "personal liberty right" is actually an economic right with purely economic consequences. But if this "right" is sufficient to invoke strict scrutiny, it would enable any property owner to use his land adverse to the public health and welfare as determined by the legislature.

The elevation of the desires of a property owner for maximum profit to that of a fundamental personal liberty, coupled with strict scrutiny of land use laws to which courts have historically deferred, is an aberrant approach to constitutional law. At a minimum, the creation of a penumbral "right to go out of business" calls into question historic preservation legislation enacted by "all 50 states and by over 500 municipalities." *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 107 (1978).

Nash cannot make out a claim under the Fifth, Thirteenth, or Fourteenth Amendments to the United States Constitution. Instead, he has pressed for creation of a state right which the California Supreme Court properly rejected and which is inadequate to invoke this Court's jurisdiction.

ARGUMENT

I.

THE DECISION RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS

The Jurisdictional Statement fails to satisfy the requirements of Supreme Court Rule 15(d) in that it does not specify in what manner a federal constitutional issue was

raised or adjudicated by the state courts. In addition, since Nash failed to seek a removal permit, the as-applied challenge he pressed in the California courts (J.S. A-1) is not cognizable here. *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980); *Martino v. Santa Clara Valley Water District*, 703 F.2d 1141, 1146 (9th Cir. 1983). Finally, the judgment of the California Supreme Court rests on adequate and independent state grounds.

The Court of Appeal identified the "personal liberty interest" that Nash advances as grounded in state law.[5] Accordingly, it based its decision solely on Article I, Section 7(a) of the state constitution. J.S. B-4,12. Indeed, the opinion cites only two federal authorities, neither for the purpose of identifying any federal right. J.S. B-5,9. That opinion was adopted *in toto* by the dissent below. J.S. A-25.

The "right" identified by the Court of Appeal was seen as the corollary to the "right to work for a living in the common occupations of the community," citing *Sail'er Inn v. Kirby,* 5 Cal.3d 1, 485 P.2d 529, 95 Cal.Rptr. 329 (1971), a judicially created state right. J.S. B-7.[6]

This Court, in *Fresh Pond Shopping Center v. Callahan,* ___ U.S. ___, 104 S.Ct. 218 (1983), determined there

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[5]The judgment of the Superior Court was based on due process and takings analysis (since abandoned), not on any supposed liberty interest. *See* J.S. C-6; *ante,* p. 3.

[6]The California Supreme Court has consistently construed the state constitution as providing greater protection of personal interests than does the federal constitution. *See, e.g., Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 84 (1980) (speech); *Committee to Defend Reproductive Rights v. Myers,* 29 Cal.3d 252, 625 P.2d 779, 172 Cal.Rptr. 866 (1981) (privacy); *City of Santa Barbara v. Adamson,* 27 Cal.3d 123, 610 P.2d 436, 164 Cal.Rptr. 539 (1980) (association). Accordingly, it would be anomalous for this Court to find Nash's purported liberty interest protected by the Thirteenth Amendment after his claim based on the "heightened" protections of the California Constitution has been rejected.

was no substantial federal question presented by a due process challenge to a virtually identical demolition ordinance enacted by Cambridge, Massachusetts. Thus, both the majority and dissenting opinions below proceeded to analyze Nash's claim under the California Constitution. J.S. A-15,23 ("we are free as was Massachusetts in [Fresh Pond], to decide the present issue entirely on the basis of state authority" (Mosk, J., dissenting)).

Since it fairly appears that the courts below rested their decisions primarily on state law, this Court should not undertake to review this case. *Michigan v. Long,* 463 U.S. 1032 (1983).

II.

THERE IS NO IMPORTANT FEDERAL QUESTION

The decision below is so obviously correct as not to warrant further review. It is squarely within the body of precedent upholding price control and land use regulations ranging from *Munn v. Illinois*, 94 U.S. 113 (1877) to *Agins v. City of Tiburon,* 447 U.S. 255 (1980). Nash did not suffer a "taking" of his property under *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978). He can rent his property at a fair return or sell the building at fair value.[7] His "bundle" of property rights has not been destroyed or "cut across." *Cf. Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982).[8] He simply cannot arbitrarily evict his tenants and demolish their homes.

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[7]Since there is no showing in the record to the contrary, it must be assumed that Nash can freely sell his property for fair value.

[8]*Loretto* recognizes the local government's "broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." 458 U.S. at 440.

Experiencing an acute shortage of vacancies exacerbated by rapid depletion of housing, Santa Monica's response was a proper — indeed necessary — exercise of the police power.[9] As Justice Holmes observed in *Block v. Hirsh*, 256 U.S. 135 (1921): "Housing is a necessity of life. All the elements of a public interest justifying some degree of public control are present." *Id.* at 156.

Yet Nash asserts that he has a liberty interest in "going out of business" protected by the "penumbra" of the Thirteenth Amendment. The City contends that Nash's interest is classically economic and measured by traditional due process analysis. Attempts to elevate rights in property to fundamental personal liberty interests were rejected by this Court nearly 60 years ago in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Nash offers no principled reason why this settled jurisprudence ought now be rejected.

A. Nash Asserts an Economic Interest, Not a Liberty Interest.

The Court below correctly determined that no fundamental personal liberty interest requiring application of strict scrutiny was at issue in this case. J.S. A-8. Appellant's claimed liberty interest is as follows: A landlord is constitutionally entitled to cease doing business by evicting tenants and demolishing the building, and still hold the land for speculative purposes. Thus, the purported liberty interest is not simply the right to cease the business of being a landlord. It is that alleged right in conjunction with the right to retain the underlying land and speculate in its appreciation through change of use.[10]

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[9]Nash concedes the public purpose of providing rental housing. J.S. A-12. The State Legislature has deemed preservation of rental housing to be a paramount goal in California, the responsibilty for which is borne by both state and local agencies. See J.S. A-8 n.5.

[10]Nash's expectation that his land will substantially appreciate if left bare assumes the ability to change its use.

This is a classic property right and well within this Court's description of property as "the group of rights inhering in the citizen's relation to the physical thing." *United States v. General Motors*, 323 U.S. 373, 378 (1945). Thus, in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), this Court ruled that a zoning ordinance:

> assailed on the grounds that it is in derogation of §1 of the 14th Amendment to the Federal Constitution in that it deprives . . . liberty and property without due process of law [272 U.S. at 370] . . . must nevertheless be sustained unless its provisions are clearly arbitrary and unreasonable, having no substantial relation to the general health, safety, morals or general welfare. 272 U.S. at 384-85.

Attempts to alter this balance and impose a more exacting standard by injecting other constitutional claims into what are principally land use cases have been uniformly rejected. See, e.g., *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974) (association); *American Communications Ass'n v. Douds,* 339 U.S. 382 (1950) (exercise of religion); *Construction Industry Association v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976) (travel); *Agricultural Labor Relations Bd. v. Superior Court,* 16 Cal.3d 392, 546 P.2d 687, 128 Cal.Rptr. 183 (1976) (right to exclude others).

Where, under the guise of the zoning power, government purports to regulate expression or other First Amendment rights, a greater justification may be required. *Schad v. Mt. Ephraim*, 452 U.S. 61 (1981); *Moore v. East Cleveland,* 431 U.S. 494 (1977). However, regulations that restrict the use of land do not invoke heightened analysis merely because they incidentally affect preferred

rights. *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974); *Grosz v. City of Miami Beach,* 721 F.2d 729 (11th Cir. 1983); *Associated Homebuilders of the Greater Eastbay, Inc. v. City of Livermore,* 18 Cal.3d 582, 557 P.2d 473, 135 Cal.Rptr. 41 (1976). Nash's liberty interests could be implicated only if he lacks viable alternatives respecting his property. *See post* at 15-16.

The California Supreme Court has ruled time and time again that the rental of property for housing purposes is a business that is appropriately addressed through the local police power. *Marina Point Ltd. v. Wolfson,* 30 Cal.3d 721, 640 P.2d 115, 180 Cal.Rptr. 496 (1982); *Fisher v. City of Berkeley,* ___ Cal.3d ___, ___P.2d ___, ___ Cal.Rptr. ___ (No. S.F. 24675, filed December 27, 1984). In these and similar cases, the California courts have followed the "rational basis" test consistently applied to economic regulations by this Court. *See Nebbia v. New York,* 291 U.S. 502 (1934). This approach was followed by the majority below; the reasoning of Justice Grodin (J.S. A-8) is sound and firmly in line with decades of well-developed authority.

Although Nash has repudiated any claim that his property has been taken (J.S. A-5, 12, 15, 23, and B-4 n.3), in actuality that is the gravamen of his complaint. Such a claim must fail here as it did in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) and in *Fresh Pond Shopping Center v. Callahan,* ___ U.S. ___, 104 S.Ct. 218 (1984). Thus, if Nash has no taking claim, he has no claim at all.

B. Regulating Nash's Ability to Freely Demolish Does Not Constitute a Taking of his Property.

When an owner of property uses it in a way that affects the public interest, it is subject to regulation that, even if it interferes with the full enjoyment of the property, is not a taking. *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978).

In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), this Court held that regulation under the police power that goes further than necessary for the public welfare would be recognized as a taking. In recent cases, the Court has focused on the character of the governmental action and the extent to which that action interferes with the property owner's reasonable expectations. *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 124 (1978), *Andrus v. Allard,* 444 U.S. 51, 65 (1979). *See, Pruneyard Shopping Center v. Robins,* 447 U.S. 74 (1980) (a taking of one stick in the bundle of property rights does not constitute a "taking" in the constitutional sense).

Here too, appellant is restricted in his manner of disposing of property. He cannot demolish without first obtaining a permit and meeting necessary criteria. One of his "sticks" may be shortened. But, the rest of the rights inhering in the ownership of property remain intact. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). Most notably, he has the right to personal use,[11] the right to fair rents, and the right to sell the property

Appellees do not deny that Section 1803(t) may preclude some alternative development of Nash's property. But that has never been sufficient to invalidate economic or land use regulations. *See, Kirby Forest Ind. v. United States,* ___ U.S. ___, 81 L.Ed.2d 1, 14 (1984) ("even a substantial reduction in the attractiveness of the property to potential purchasers does not entitle the owner to compensation"); *Penn Central Transp. Corp. v. New York City,* 438 U.S. 104, 130 (1978) ("[in]ability to exploit a property interest" is not a taking); *Troy Ltd. v. Renna,* 727 F.2d 287, 300 (3d Cir. 1984) (New Jersey's

[11] Nash may evict a tenant so he or a relative may occupy the unit. City Charter §1806(h). J.S. F-25.

eviction ban providing life tenancies for senior citizens was not a taking since fair rents were guaranteed).

C. There is No Thirteenth Amendment Right Implicated Here.

Cases considering the Thirteenth Amendment focus on an element of compulsion without alternatives. The Amendment only prohibits "superior and overpowering force, constantly present and threatening" compelling continued service. *United States v. Shackney,* 333 F.2d 475, 485-86 (2d Cir. 1964). If there is any alternative, even if it "may entail consequences that are exceedingly bad," a Thirteenth Amendment claim will be defeated. *Id.*

Thus, in *Flood v. Kuhn,* 316 F.Supp. 271 (S.D.N.Y. 1970), *aff'd* 443 F.2d 264 (2d Cir. 1971), *aff'd* 407 U.S. 258 (1972), the District Court rejected a Thirteenth Amendment challenge to baseball's reserve system, although it effectively denied a baseball player's freedom throughout his career to choose his employer. Noting that a player had the right to retire and embark on a new enterprise outside baseball, the court observed that "the financial loss [Flood] might thus sustain may affect his choice, but does not leave him with 'no way to avoid continued service.'" 316 F.Supp. at 281 (citation omitted). *See, Williamson v. Vardeman,* 674 F.2d 1211, 1214 (8th Cir. 1982) (rejecting Thirteenth Amendment challenge to compulsory service by attorneys to indigent defendants).[12]

1. Nash May "Go Out of Business."

If the Santa Monica law compelled Nash to remain a landlord without alternatives, it might be appropriate to strictly scrutinize the regulation. But this is not the case. Nash is simply precluded from taking one particular route

[12]The Eighth Circuit also dismissed a due process claim that services were taken without just compensation. 674 F.2d at 1214. No such analysis is necessary here since Nash admits he is being fairly compensated.

"out of the business." He may sell the property and invest his capital and resources elsewhere. But his right to go out of business does not encompass a right to change use.

Nash's land is zoned for multi-family residential use. As a practical matter, it can only be used for apartments or condominiums. There is no pretense that Nash would leave the land fallow indefinitely (constituting both a blight on the community and a burden on Nash). Therefore, Nash's purported "right to go out of business" is a feigned purpose underlying his desire to change use in order to maximize profit.

Appellant's principal cases, *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), and *Robinson v. Diamond Housing Corp.*, 463 F.2d 853 (D.C. Cir. 1972), do not support his argument for a fundamental right to go out of business. In these cases, a distinction was drawn between a right to cease business entirely and a "partial closing." Where the purpose of partial closing is invidious or designed to obtain an economic advantage not otherwise available, regulation is appropriate. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 275 (1965); *Robinson v. Diamond Housing Corp.*, 463 F.2d 853, 867 (D.C. Cir. 1972).

Here, although Nash has the "right to terminate his entire business" of being an investor in land, he pursues a "partial closing" with attendant economic benefit, *i.e.*, terminating one part of his business (renting apartments) and continuing the remaining part (speculation in land for appreciation and future development). This "right" is precisely what this Court refused to countenance in *Darlington*.

Thus, one cannot fashion the "right to go out of business" in any convenient manner. Appellant may go out of business, but he cannot retain rights and avoid responsibilities that are associated with that business. *See,*

Ashland Oil Co. v. Federal Energy Adm., 389 F.Supp. 1119 (N.D. Cal. 1975) (no right to continue receiving oil allocations after ceasing business); *Shapiro Bros. Shoe Co., Inc. v. Lewiston-Auburn Shoe Workers Protective Ass'n.*, 320 A.2d 247 (Me. 1974) (upholding law restricting plant closure); *People v. Greene*, 264 Cal.App.2d 774, 70 Cal.Rptr. 818, 821 (1968) (dam owner cannot simply "cease to operate his dam, abandon his work, and do nothing"). Nash may cease being a landlord, but he may not do so and still be a land speculator.[13]

2. Nash Has Several Viable Alternatives.

Nash has more options than did the property owners in *Hawaii Housing Authority v. Midkiff*, ___ U.S. ___, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984). There, this Court upheld the Hawaii Land Reform Act which required, in essence, a forced sale of a landowner's property to his tenants. *See* 81 L.Ed.2d at 192. Yet, Nash is neither precluded from alienating his property to whomever he wants nor forced to endure continued contact with tenants.[14]

As the California Supreme Court observed (J.S. A-6-7), Nash has several viable alternatives to the "personal service" he apparently abhors. He may sell his property at fair value; he may hire a professional property management service to insulate himself from the tenants[15]; or he

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[13]Appellant freely admits that he seeks to demolish in order to speculate that the land will appreciate. See Nash's Response Brief in the California Court of Appeal at 3, 21; *ante* at 3.

[14]The existence of viable alternatives is also relevant for a taking analysis. *See Maher v. City of New Orleans*, 516 F.2d 1051, 1066 (5th Cir. 1975) ("Maher did not show that the sale of the property was impracticable, that commercial rental could not provide a reasonable rate of return, or that other potential use of the property was foreclosed").

[15]Indeed, appellant has apparently done just that. The Rent Control Board's records show Nash's property to be managed by Nashland Properties, Inc., a California corporation. Nashland also manages other rental property in Santa Monica.

may empty his building through attrition. Indeed, Nash could sell just his building and lease the underlying land,[16] which would accomplish his ostensible goal of going out of the landlord business while holding the land as an investment.

Moreover, under a recent amendment to the City Charter, Nash may convert the building to condominiums by selling the units to consenting tenants. Under City Charter Section 2007, a "Tenant-Participating Conversion" is exempt from the strictures of Section 1803(t).[17] Thus, Nash today has even more alternatives than he did when the cause was argued below.

Nash does not explain why resort to the options described above is an unconstitutional deprivation of personal liberties.[18] Admittedly, these options might not realize maximum profit for Nash. If that is the gravamen of his complaint, and appellees contend that it is, then the basis of this lawsuit — fundamental personal liberties — is contrived as an end run around traditional due process analysis. His suggestion that appellees force him to transfer his property is devoid of reason or factual support. Section 1803(t) is not concerned with ownership or transfer of the property. *See Santa Monica Pines v. Santa Monica Rent Control Board,* 35 Cal.3d 858, 679 P.2d

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[16]This appears to have been a prevailing practice in Hawaii prior to the Land Reform Act. *See Hawaii Housing Authority v. Midkiff,* 81 L.Ed. 2d at 192.

[17]This Charter Amendment specifically supercedes the condominium conversion moratorium referred to by the Court of Appeal. J.S. B-5 n.5. The Tenant-Participating Conversion process may be seen as providing Nash with a remedy additional to the removal permit process, which Nash unilaterally abandoned. Thus, Nash has less excuse for failure to exhaust such remedies now than he did when the case was filed five years ago.

[18]He claims only that sale is not guaranteed to bring fair market value (J.S. at 9). Even if that argument were germane, his fears would have to find factual support in the record. They do not.

27, 201 Cal.Rptr. 593 (1984) (upholding Section 1803(t) as not interfering with state created rights to subdivide and sell property as condominiums). Nash is free to keep his land or sell it as he chooses. However, his *right* and *ability* to sell defeats his argument that he is forced to remain in the landlord business.

3. Nash Has Treated this Property as a Typical Investment; His Ownership of Rental Housing Does Not Require Personal Service.

A claim similar to that raised by Nash was rejected by Justice Holmes in *Marcus Brown Co. v. Feldman*, 256 U.S. 170 (1921):

> It is true that the traditions of our law are opposed to compelling a man to perform strictly personal services against his will even when he has contracted to render them. But the services in question although involving some activities are so far from personal that they constitute the universal and necessary incidents of modern apartment houses. *Id.* at 199.

Accord, Marquam Investment Corp. v. Beers, 615 P.2d 1064, 1071 (Or. App. 1980).

It is undeniable that the owner of rental property is exposed to tort liability for harm caused to inhabitants and visitors. This is a business risk equivalent to that borne in other businesses.[19] It does not alter the economic nature of the rights involved.

Nash purchased the building as an investment. J.S. at 4. He does not live in it and "plans to hold it, in the manner

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[19]Indeed, Nash cannot avoid tort liability by leaving his land fallow. *See Sprecher v. Adamson Properties*, 30 Cal.3d 358, 636 P.2d 1121, 178 Cal.Rptr. 783 (1981).

typical of personal or corporate investors in real estate, i.e., purely as a form of economic investment." J.S. A-11 n.6.[20] He earns a return, both from the income stream produced by rentals and from normal appreciation of the underlying land, If the land turns out to be worth less than he thought it would, and he does not realize the gain he had hoped for, or even if he loses money on sale, his cause of action lies under the takings clause. *Agins v. City of Tiburon,* 447 U.S. 255 (1980).

D. Demolition Controls Do Not Abridge Fundamental Rights.

Appellees are unaware of any case that holds a landowner has a fundamental right, whether grounded in the Thirteenth Amendment or elsewhere, to demolish structures. Rather, demolition controls have been sustained as valid exercises of the police power. *See, e.g., Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978); *Maher v. City of New Orleans,* 516 F.2d 1051 (5th Cir. 1975).

Demolition restrictions have also withstood claims they abridged fundamental constitutional rights. *See Society for Ethical Culture v. Spatt,* 68 App.Div.2d 112, 416 N.Y.S.2d 246 (1979), *aff'd* 51 N.Y.2d 449, 434 N.Y.S.2d 932, 415 N.E.2d 922 (1980) (landmarks preservation law did not interfere with the free exercise of religion); *Lafayette Park Baptist Church v. Board of Adjustment of City of St. Louis,* 599 S.W.2d 61, 66 (Mo.App. 1980) (historic district ordinance restricting demolition of church property is essentially a zoning ordinance).

The class of fundamental rights is not casually enlarged. *Seaone v. Ortho Pharmaceuticals, Inc.,* 660 F.2d 146, 149 (5th Cir. 1981). It includes only those rights "explicitly or implicitly guaranteed by the Constitution." *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 33-34

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[20]The court below also noted that this particular parcel has no sentimental or other special meaning to Nash. J.S. A-11 n.6.

(1973). Thus in a parallel context the Fifth Circuit declined to find a "fundamental right" to alienate real property. *National Western Life Ins. Co. v. Commodore Cove Improv. Dist.*, 678 F.2d 24, 26 (5th Cir. 1982); *cf., Andrus v. Allard*, 444 U.S. 51 (1979).

In the final analysis, demolition controls are no different than other land use and economic regulations. To insist on a "compelling" justification for them is to require re-examination of numerous other restrictions on property long thought to be valid exercises of the police power. The Fifth and Fourteenth Amendments adequately protect rights in property; searching for preferred status in the penumbra of the Thirteenth Amendment embarks on a new and dangerous course.

CONCLUSION

Nash's theory is unprecedented. Not only does it repudiate *Penn Central* and *Fresh Pond*, it wholly discards the rational basis test in favor of strict scrutiny of economic regulation, a test until now reserved for cases genuinely inhibiting fundamental liberties. Although Nash seeks to set a dramatic precedent applicable to price and land use regulations generally, it is inappropriate for the Court to reexamine the rational basis test in this case and on this record, particularly since the decision below rests on adequate and independent state grounds. It is respectfully requested that this motion be granted and the appeal dismissed for lack of a substantial federal question.

Respectfully submitted,

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State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on February 15, 1985, I served the within *Motion to Dismiss* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Rich & Ezer
Mitchel J. Ezer
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Los Angeles, California 90067
(Three copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 15, 1985, at Los Angeles, California.

Robin McColgan
(Original signed)